

2019 FOURTH CIRCUIT ESSAY CONTEST



How has the right to freedom of speech established for public school students in the Supreme Court case of *Tinker v. Des Moines* evolved in the 50 years since it was decided?

Constitution Day Program

September 19, 2019
2:30 p.m.

LEWIS F. POWELL, JR.
UNITED STATES COURTHOUSE
1000 EAST MAIN STREET
RICHMOND, VIRGINIA

Program

OPENING REMARKS

THE HONORABLE ROGER L. GREGORY
Chief United States Circuit Judge for the Fourth Circuit

READING OF THE THIRD PLACE ESSAY

ELI KUPERMAN
Introduced by Rachel Lee

READING OF THE SECOND PLACE ESSAY

LORELEI LORAINÉ
Introduced by Jocelyn Mitchell Manion

READING OF THE FIRST PLACE ESSAY

ISABEL SANS
Introduced by Joseph L. Coleman, Jr.

CONCLUSION

THE HONORABLE ROGER L. GREGORY

Refreshments will be served in the Library (first floor)
at the conclusion of the program.

About the Contest

As long as we remain focused on promoting young citizens' understanding of the Constitution, it will remain a powerful instrument for ensuring the stability of our government and the liberty of the governed. The United States Court of Appeals for the Fourth Circuit is pleased to have contributed to this effort through the 2019 Fourth Circuit Essay Contest. This year's contest asked students to consider and share their thoughts on the question: "How has the right to freedom of speech established for public school students in the Supreme Court case of *Tinker v. Des Moines* evolved in the 50 years since it was decided? "

The contest was open to high school students currently in grades 9 through 12 in Maryland, Virginia, West Virginia, North Carolina, and South Carolina. The court received 345 submissions. The top three submissions were selected by our panel of judges through a blind review process.

The court extends its appreciation to its panel of judges for their work in reviewing the essays and selecting the top three submissions: **Susan Bon, J.D., Ph.D.**, Professor and Higher Education Program Coordinator, University of South Carolina; Affiliate Professor, University of South Carolina School of Law; Faculty Civil Advocate; **Andrew K. Clark, J.D.**, Partner, Hirschler Fleischer; Director, Federal Bar Association; Trustee, Historic Richmond; Director, Historical Society for the Eastern District of Virginia; **Robert H. Edmunds, Jr., J.D.**, Counsel, Fox Rothschild LLP; Chair, North Carolina Bar Association Appellate Rules Committee; Director, BarCares; **Paula M. Stanton, Ph.D.**, English Department Chair, Bel Air High School; 2018 Harford County, Maryland Teacher of the Year; and **Joshua Weishart, J.D.**, Associate Professor of Law and Policy, West Virginia University College of Law and the John D. Rockefeller IV School of Policy and Politics; Administrator, WV ED Law Blog.

We would like to thank the judges, attorneys, educators, court staff, and students from throughout the Fourth Circuit whose contributions of time and effort helped make our annual high school essay contest a success.

First ★
Place ★ Isabel Sans
★ Abingdon, MD
★



Isabel Sans is an incoming junior at Edgewood High School in Edgewood, Maryland. Her favorite subjects are English and history. Isabel plans to pursue a degree in history with a minor in Spanish or Italian, and she would like to move to Madrid to research the Spanish Civil War following college. Isabel's interests and activities include reading, history, music, traveling, volunteering, trivia games and expanding her collection of old books.

One's right to free speech is not absolute. Throughout American history, courts have supported restrictions upon time, place, and type of speech to be protected. When "student free speech" is queried on Google, the results page comes slathered in reports of battles over religious iconography, student journalism, social media posts, and online harassment.

In short, controversy.

Yet, these are issues that Mary Beth Tinker was hardly thinking about when she wore a black armband to school to protest the Vietnam War, and issues that her court case never touched.

Tinker v. Des Moines is the textbook students' rights victory. It established that students do not "shed their constitutional rights... at the schoolhouse gate ^[8]" and created the Tinker Standard, a test which can be administered to student speech cases to ascertain

whether their speech is protected under the First Amendment. As with many cases turned precedents, *Tinker* is not a one-size-fits-all solution. It has been challenged over the years in the increasingly complicated realm of students' voices and the ways they are heard. In that sense, the *Tinker* decision is very much alive and evolving, moving backwards and forwards in the scope of its protections, piloting new cultural obstacles, and maneuvering through new territory as time marches forward.

Subsequent cases *Bethel v. Fraser* (1986) and *Hazelwood v. Kuhlmeier* (1988) are viewed as steps backwards from *Tinker*, allowing schools broader jurisdiction over what students can say. The first held that administrators could prevent students from giving 'vulgar' or 'lewd' speeches that were "inconsistent with the 'fundamental values of public-school education.'"^[2] The second allowed school officials more leeway in censoring school-sponsored newspapers. In both cases, the *Tinker* ruling did not force schools to protect certain kinds of speech.

Following *Hazelwood* came tragedies like the Columbine and Parkland shootings, after which schools were presented with another complicated layer of student speech: protecting their students from violence by peers. Following the cultural fallout of the Columbine shooting in 1999, the school (and others) expanded zero-tolerance policies pertaining to drugs and weapons to include "*controversial student expression in poetry, songs, and art, especially if such expression appear[s] to be tied in any way to potential acts of violence.*"^[7] In the law, those are dangerous words. They have incredible potential for abuse in their ambiguity.

The heavy peals of Columbine's warning bells can be heard in several cases fought in its wake. In *LaVine v. Blaine School District* (9th Cir. 2001), a student argued that he was wrongfully expelled after writing a poem examining the mindset of a hypothetical school shooter. Applying the *Tinker* Standard, the Court ruled in favor of administrators. The case had to be deliberated considering the current environment: "Taken together and given the backdrop of

actual school shootings ... these circumstances were sufficient to have led school authorities reasonably to forecast substantial disruption.^[5]”

Similar in tone was *Emmet v. Kent School District #415* (2000), in which a student was suspended after a website was found with tongue-in-cheek "obituaries" of students, and a poll which allowed visitors to vote on who would "die" next (whose would be the next mock obituary). Noting the minor resemblances to the website Eric Harris had maintained prior to his killing spree,^[1] a reporter called the website a "hit list" and the student was promptly suspended for "intimidation, harassment, [and] disruption to the educational process."^[3] The court ruled in favor of the student despite the alarmist characterization by the media, as there was not enough evidence to prove the student was intending to do harm, and the website did not meet the Tinker Standard.

Uniquely modern dangers like cyberbullying force *Tinker* into a corner: if speech is made outside the "schoolhouse gate," can schools suppress it? A new area of law developing at breakneck pace, social media prosecutions are only just beginning, and *Tinker's* interpretation is being reworked to fit the newest set of criteria.

In 2015, Reid Sagehorn sued his school for suspending him over a tweet made about a teacher outside of school hours and grounds. A Minnesota judge in *Sagehorn v. Independent School District #728* ruled that school officials could not suspend students over such posts unless they "are true threats or are reasonably calculated to reach the school environment *and* are so egregious as to pose a serious safety risk or other substantial disruption."^[10] It set an incredibly high bar for schools to prove that posts cause disruptions in line with the Tinker Standard. The case also established that schools can only use *Fraser's* allowance to define 'vulgar' speech as they see fit when it is made on-campus, regardless of whether it is digital. The verdict at once expanded and limited *Tinker's* initial protections.

Conversely, there are cases like *Bell v. Itawamba County School Board* which arose the same year. In this case, the Fifth Circuit court found it acceptable for administrators to suspend a student for posting a rap song to YouTube that harassed and intimidated teachers. The majority opinion was that teachers “reasonably could find Bell’s rap recording threatened, harassed, and intimidated [them]; and a substantial disruption reasonably could have been forecast.^[4]” In other words, it passed the Tinker Test. Echoing *LaVine*, the judges cited increased school violence as a factor in their verdict.

Democracy and our society are constantly in a period of change; its institutions consistently evolve to meet new challengers and solve modern problems. Free speech is a work in progress. Our vast tome of laws is a work in progress. *Tinker* has undergone quite the makeover in response to innovations and changes in culture and thinking, but its heart has remained true. A landmark Supreme Court case, its precedent that students will never be required to “shed their constitutional rights... at the schoolhouse gate^[8]” is the undercurrent which has carried all subsequent lawsuits for and against students over their speech, from symbolic armbands to Twitter posts to unfurled banners reading “Bong Hits 4 Jesus^[6]” and a memorial to our founding principles of freedom and liberty.

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Second Place ★★ Lorelei Loraine ★★ Ellicott City, MD



Lorelei Loraine is an incoming senior at Mt. Hebron High School in Ellicott City, Maryland. Her favorite school subjects are economics, comparative politics and calculus. She plans to pursue a degree in economics, and eventually a PhD. Lorelei enjoys Model UN, the National Economics Challenge, Mock Trial and dance team. She most recently served as an intern with the Howard County Economic Development Authority.

Why are alarm clocks not chastised for their disruptiveness? The answer is obvious to anyone who routinely begs for fifteen more minutes: disruption is the point of the alarm clock. This morning intervention is unpleasant, but everyone knows that it is necessary-- and thus, millions of people rely on their alarm clocks to jumpstart their days.

Student activists have been the uncelebrated labor of social movements since society began moving, but in recent years speakers like Emma Gonzalez and Malala Yousafzai have risen to progressive superstardom. At the same time as our culture is beginning to value young activists' role as social alarm clocks, the American court system has been distilling the narrow allowance for free speech in schools. In the years since Tinker and her armband forced the Supreme Court to acknowledge children's political clout, the courts and the American ethos have pulled in opposite directions, moderating each other.

Mary Beth Tinker and Christopher Eckhardt's protest of the Vietnam War was given little attention at first: a preemptive warning from their school, quiet suspensions, and dismissals from the district and the circuit courts.¹ The indifference ended when the Supreme Court reversed the decisions of the school district and both courts with an opinion on *Tinker v. Des Moines* that famously proclaimed that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."² The decision set forth the precedent for the many issues of student protest that followed: the substantial disruption test, which protects speech that does not distract classmates or impair the school.³ This adhered to the spirit of the Constitution-- rights are universal-- but balanced it with pragmatism regarding education. The test has been applied widely but continues to change even today; the Fifth Circuit Court found that even off-campus speech may be regulated by schools if it materially damages the school environment in *Bell v. Itawamba County School Board* in 2015.⁴

As is characteristic of Supreme Court decisions, there are subtleties in the *Tinker* decision that have been magnified by subsequent interpretations. The lesser known "invasion of the rights of others" criterion for banning student speech was implicated in the 2006 decision in *Harper v. Poway Unified School District*, which prohibited a student from wearing a shirt destructively condemning homosexuality.⁵ Courts found in *Karp v. Becken* (1973) and *Dodd v. Rambis* (1981) that schools may forestall speech they predict will be disruptive with reasonable evidence, so they do not have to wait for a rebellion to occur.⁶ Since *Tinker* was decided in 1969, some have criticized courts at all levels for abandoning the protections that the original case provided for free speech in schools while others argue that the nature of the legal system is to produce clearer guidelines over time. Regardless of opinion, public or scholarly, it is clear that repeated applications have made the precedent set by *Tinker* more conservative and punitive.

Despite the legal trend towards reducing freedom of speech in schools, American society increasingly allows its young people to steer it towards change. Students lead movements about gun laws, the environment, gender and sexuality rights, and nearly every other cause that could be argued for or against, and their activism in school bleeds into the broader social conversation. Walkouts over school shootings inform gun laws, students on Twitter provoked multinational companies to nix drinking straws, and dress code protests are reflected in empowerment demonstrations like #MeToo.

It is undeniable that campus protests were influential before the 21st century-- *Tinker v. Des Moines* was argued in the Supreme Court, after all-- but modern culture is more accepting and even encouraging of student activism than ever before. The popularity of the internet and teenagers' social media acumen have given young people the new opportunity of instigating change on the global stage, not just the local one.⁷ Students who can convince adults that the world's problems affect them, too, garner respect and attention, and the internet is the perfect vehicle. After the shooting at Parkland High School, students on Twitter drew popular outrage to lax gun legislation. Acting as an alarm that society could not snooze, they condemned the stagnation that happens after school shootings when promises of reform are never fulfilled.⁸ There has been a verifiable rise in student activism in the years since *Tinker* was argued, and though the courts have become more stringent, adults are increasingly accepting teenagers' place in advocacy.

The disconnect between the court system and public opinion is purposeful; the increasing conservatism of legal precedents on school speech for example is counterbalanced by rise of young, progressive icons to produce a system based on reason. Youthful alarm clocks signal that change is imminent and kickstart movements to bring it about. Grandfather clocks that clang at regular intervals could never scare people out of

sleep, but they are a reliable and trustworthy presence. Since *Tinker v. Des Moines* was decided, the push and pull of culture and law has developed a social system that balances activism with education, and that balance is likely to further improve as people continue to interact with their court system.

¹ "Tinker v. Des Moines Independent Community School District." *Oyez*, 12 Apr. 2019, www.oyez.org/cases/1968/21.

² "Tinker v. Des Moines - Landmark Supreme Court Ruling on Behalf of Student Expression." *American Civil Liberties Union*, ACLU, www.aclu.org/other/tinker-v-des-moines-landmark-supreme-court-ruling-behalf-student-expression.

³ Hudson Jr., David L. "Substantial Disruption Test." *The First Amendment Encyclopedia*, Middle Tennessee State University, <https://www.mtsu.edu/first-amendment/article/1584/substantial-disruption-test>

⁴ Hudson Jr.

⁵ "Classroom Walk-Outs and School Protests." *Freedom Forum Institute*, www.freedomforuminstitute.org/first-amendment-center/primers/18655-2/.

⁶ "Classroom Walk-Outs and School Protests."

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Third Place ★★ Eli Kuperman ★★ Columbia, MD



Eli Kuperman is an incoming senior at Long Reach High School in Columbia, MD. His favorite subjects are math, choir and government. He plans to pursue a degree in economics with focuses in business management and finance, eventually returning to school to obtain an M.B.A. The performing arts are his passion, and he participates in state, county and school level choral groups. Eli has performed in every school musical since his freshman year, and he is president of the Music Honors Society. Eli is also passionate about speech and debate and is president of the Speech and Debate team. When he has free time, Eli can be found playing computer games or volunteering at the Canine Humane Network, a rescue dog shelter.

The Young and Mighty The Empowerment of an Unheard Voice

As former first lady and youth advocate Michelle Obama writes in her memoir *Becoming*, "If there's one thing I've learned in life, it's the power of using your voice. I tried my best to speak the truth and shed light on the stories of people who are often brushed aside." The voices of those who are ignored or marginalized often need help to be heard, and America has a long history of passing legislation to assist those whose voice ought to resound as loudly as any other citizen - to speak a little louder to get their message across. People of color were given the right to vote with the 15th Amendment in 1870, women with the 19th Amendment in 1920, and the impoverished and maleducated with both the 24th Amendment

and Voting Rights Act in 1964 and 1965 respectfully. School students, however, did not achieve the power to use their voice until 1969, with the revolutionary acts of Mary Beth Tinker that led to the decision of the *Tinker vs. Des Moines* case. Interestingly, the Amendment with which this earth-shattering decision was justified was simply the first and this raises a simple but puzzling question; What changed? It certainly was not the First Amendment, which was submitted for ratification in 1789 and passed in 1791. Since the legislation remained constant, the only possible source of change in the issue of students' rights are the students themselves. This truth remains apparent today, with the appearances of high school students as political advocates for prominent social issues on national news, newspapers, social media, and talk shows, employing multiple platforms to express their concerns and ideas. The changes in the ability for students to properly and fully use their First Amendment right can be directly attributed to precedents set by revolutionary teenagers, along with the acceptance of student voices as valued contributions to American society.

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker v Des Moines*, 1969). These words from Justice Abe Fortas in the *Tinker vs. Des Moines* case would become famously known as the precedent for students' rights all across the nation. The case began when Mary Beth Tinker, a 13 year old 8th grader at the time, and two older high school students wore black armbands to show support of a truce in the Vietnam War in December of 1965. The students were sent home and suspended because of a refusal to remove the armbands, prompting the parents to sue the school district for violating the students' freedom of speech rights. The Supreme Court sided with Tinker by a 7-2 decision, which was a victory for students all across the nation, an unheard-of freedom for students in the right to exercise the First Amendment in school.

The extent to which the students of America could use their newfound freedom would be tested and expanded over the years. In

cases such as *Bethel v Fraser* (1968), *Hazelwood v Kuhlmeier* (1988), and, more recently, *Morse v Frederick* (2007), students have attempted to expand their freedoms and test the extent to which they can convey a message using the First Amendment. However, in all of these cases, the students have been shut down, as the precedent set in *Tinker v Des Moines* (1969) is not mutually exclusive from the precedent that the government and its facilities, such as schools, maintain a right to censorship. The idea of censorship can be best explained by the *Hazelwood v Kuhlmeier* case of 1988: “A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.” Although this set a clearer precedent addressing the First Amendment interpretation for students within school walls, it also made clear that “the government could not censor similar speech outside the school,” an idea which would be used to fully empower students to make their voices heard.

On February 14th, 2018, the unthinkable happened inside of Marjory Stoneman Douglas High School in Parkland, Florida. A former student, armed with an AR-15 style semi-automatic weapon, opened fire within the school, killing 17 people and harming many others. After such a tragedy, a voice for good was needed--a voice to lead the people in response to such a horrible event. A voice to prevent such a travesty from happening ever again. And this voice appeared. Except, it was not the voice people expected. It was not a political figure, or a celebrity, or a sports star. The voice came in the form of the surviving students of the shooting. Names like Emma Gonzalez and Cameron Kasky became household names, as millions of people all across the world bore witness to 17 and 18 year old students leading marches in Washington and speaking on issues which previously were only discussed by adults. An unfolding wave of evolution occurred in front of the eyes of hundreds of millions of Americans. Students, after 40 years, yet again became political revolutionaries for voice and justice.

Although the scale of the direct political impact of Mary Beth

Tinker's black armband pales in comparison to Emma Gonzalez's March for Our Lives, many similarities can be drawn. Both are examples of passionate students determined to make a difference. These young women became household names because of revolutionary actions. And most importantly, they both inspired countless other students to make a difference, too. Although the laws have not changed, the inspiration given to the children of America by students like Tinker and Gonzalez have empowered countless voices that were once brushed. These similarities are summarized best by Emma Gonzalez herself: "We are going to be the kids you read about in textbooks...Just like *Tinker v. Des Moines*, we are going to change the law."

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United States Court of Appeals for the Fourth Circuit

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